

U.S. Department of Labor

Office of Administrative Law Judges
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In The Matter of)	
THOMAS C. MADIGAN,)	DATE: December 2, 1999
Claimant,)	
)	CASE NO. : 1999-LHC-1112
v.)	
)	
RAYTHEON RANGE SYSTEMS,)	
Employer,)	
and)	
LIBERTY MUTUAL INSURANCE COMPANY,)	
Carrier.)	

Appearances: Jay Lawrence Friedheim, Esq.
For Claimant

Kurt A. Gronau, Esq.
For Employer and Carrier

Before: JOHN C. HOLMES
Administrative Law Judge

ORDER DENYING BENEFITS IN PART AND GRANTING BENEFITS IN PART

This case arose out of the filing of a claim by Mr. Thomas C. Madigan ("Claimant") for benefits under the Longshore and Harbor Workers Compensation Act, 33 U.S.C. § 901 *et seq.* (the "Act" or the "LHWCA"), as amended by the Defense Base Act, 42 U.S.C. § 1651 *et seq.* ("DBA"). Specifically, Claimant seeks payment of benefits for permanent partial disability as well as for medical and related expenses from Raytheon Range Systems ("Employer") in connection with an accident he suffered while working on Kwajalein Atoll in the Pacific Ocean.

The parties have stipulated to the following: 1) fact of injury, 2) the average weekly wage is \$722.33, 3) the injury has resulted in restrictions on activity, and 4) the injury is covered under the Act and DBA. (Letter of July 9, 1999). I accept the first three on their face as determinations of fact. I also agree that the Defense Base Act is applicable here, and hence the LHWCA is as well. The DBA, of course, applies "to the injury or death of any employee engaged in any employment ... under a contract entered into with the United States or any executive department, independent establishment, or agency thereof ... where such contract is to be performed outside the continental United States ... for the purpose of engaging in public work." 42 U.S.C. § 1651. Claimant was an employee of a government contractor engaged in maintaining the Global

Positioning system (“GPS”) in the Marshall Islands, and hence falls within the DBA purview. The parties also do not dispute the date of Maximum Medical Improvement, which is October 27, 1997. (Employer’s Pre-hearing statement; Claimant’s Brief).

Statement of Facts

At the time of the accident, Claimant was 57 years old, and married with children. (C-1, p. 2; T-21).

Claimant worked on Kwajalein beginning in July of 1993, when he was hired by Dyncorp to supervise the technicians maintaining the ground station for the GPS installation there. (T-18). In January of 1994, Claimant suffered an injury to his right shoulder. (E-5, p. 59)¹. He had an operation to repair his rotator cuff on that shoulder and engaged in rehabilitative therapy, and eventually regained full use of the arm. This is not the injury in question here.

On October 7, 1994, Raytheon Range Systems took over the government contract for site maintenance, and Mr. Madigan was hired to continue in his same job as the lead technician/GPS Unit Leader. (E-7, p. 203). On May 30, 1995, Claimant, while an employee of Raytheon, left his home at approximately 10:00 p.m. and began to ride his bicycle to his job site, where there had been problems with a transformer. He stated that he wanted to take a look before retiring for the night. During this ride, a cat darted out from behind a garbage dumpster and ran under the front wheel of Claimant’s bike, causing him to be thrown over the handlebars and strike the ground. Claimant injured his left shoulder and sustained some minor injuries to his head in the fall. He returned home, cleaned himself up, and retired. The next day, he reported the accident and sought medical treatment. (T- 26).

Conservative attempts were made at treatment, but were unsuccessful. Initially, the injury was thought to be a separation or tendonitis (C-1, p 3-4), but was diagnosed on June 30 as a torn rotator cuff. (C-1, p. 5). Claimant had an anthrogram on July 10, 1995, and received an injection to relieve the pain. (C-1, p. 6). Throughout this period, Claimant was on light duty. (C-8, p.258-271). He was returned to regular duty on September 19, 1995. (C-8, p. 257).² The maintenance contract, meanwhile, came up for bid and was awarded to a new contractor, who subcontracted responsibility for the GPS station to PRC. Claimant interviewed with PRC management in Honolulu, and was subsequently hired to continue as lead technician. His start date was September 1, 1995. Claimant continued to perform the same duties with PRC as he had done with Dyncorp and Raytheon as a Maintenance Manager. (E-10, p. 310). Treatment of the shoulder through injections and exercise continued.

¹Each page of Claimant’s (C) and Employer’s (E) exhibits has received an individual Bates number. The page numbers following each exhibit number refer to those numbers.

²The remainder of this report, by a Dr. Melville at Kwajalein Hospital, is illegible.

On April 26, 1996, Claimant was notified that he was being demoted from lead technician because of poor job performance and consumption of alcohol during duty hours. (E-10, p. 320-321).

Finally, on June 11, 1996, Claimant was notified that a Reduction In Force (RIF) had been authorized by the Air Force, and that the work force on Kwajalein would be reduced by one person, and that Claimant was to be the worker laid off.

A few weeks later, on June 28, 1996, it was determined by Dr. Kan in Honolulu that surgery would be necessary because the shoulder had failed to respond to the conservative measures employed. (C-1, p. 11). This surgery took place on July 15, 1996. Rehabilitation was done in Honolulu and on Kwajalein, in addition to home exercises performed by Claimant. Pain continued, however, as did difficulties with scheduling rehabilitation due to the loss of access to the base on Kwajalein because of the RIF. Claimant was living on Ebeye, then moved to Guam. Progress was slow, and doctors determined that scar tissue had developed in the shoulder which was causing pain. Dr. Marumoto in Honolulu finally determined that a second operation was necessary, and he performed such on January 21, 1997. (C-1, p. 17). Thereupon, Claimant engaged in rehabilitation in Kuauai, the Philippines, Kwajalein, and at home. There was apparently a great deal of difficulty in arranging the rehabilitation, and in fact the time in the Philippines was paid for by Claimant's wife's insurance, and not Liberty Mutual ("Carrier"). Dr. Marumoto noted several times that he did note some progress, but recovery was slow. This was due, he felt, to excessive scarring in the shoulder and "suboptimal maintenance of motion on his [Claimant's] part." (E-8, p. 208). Eventually, Dr. Marumoto considered a third operation, but this was not done. (C-1, p. 23).

Carrier has paid all medical expenses involved in these operations. (T-61). Carrier had also paid for the related expenses of transportation, hotel rooms, and *per diems* for the first operation, but is alleged to have not paid those expenses following the second operation. While receiving therapy in the Philippines and Kuauai following the second operation, Claimant stayed with in-laws and his daughter, respectively. He apparently paid his in-laws an undefined amount, and promised to pay his daughter at some future point.

The position of GPS Unit Leader is described as:

"Directs all assigned personnel in the 24 hour/7 day per week operation and associated maintenance of all equipment of the NAVSTAR Global Positioning System in accordance with the applicable manuals and directives. Coordinates with the Master Control Station in maintaining the Monitor Station and Ground Antennae segments of the system.

- Instructs employees as to work methods, procedures and goals.
- Interprets company policies and work rules for subordinates.
- Assigns, directs and revises work assignments of subordinates to

meet schedules.

- Provides periodic programs reports to management.
- Ensures accuracy of maintenance, bench stock and property records.
- Ensures all transfers of accountable equipment are authorized and documented in accordance with established procedures.
- Supervises personnel assigned to the unit. Interviews, selects and recommends hiring of personnel. Initiates recommendations for changes in classification, promotion, demotion, transfer and termination. Settles grievances and administers appropriate disciplinary action.” (E-6).

Findings of Facts and Conclusions

Disability and Compensation

It is undisputed by the parties that the injury has resulted in some restriction on Claimant, and that his recovery has reached a point of maximum improvement. Improvement reached a plateau on October 27, 1997. This date of Maximum Medical Improvement is taken from the pre-hearing statement of Employer, the concession of that date in the post-hearing brief of Claimant, and is supported by the testimony of Dr. Marumoto. The physician, although hopeful of some future improvement, indicated that between the visits to him of May and October of 1997, improvement was minimal, and began discussing the option of “living with it.” (C-1, p 23; Marumoto Deposition, p. 31-34).

Similarly, the restrictions on Claimant are not disputed. He has pain and difficulty reaching overhead, and his ability to lift weights is limited to ten pounds; he is categorized as sedentary. (C-5, E-9, E-13). The report of “SOAR,” a sports rehabilitation clinic headed by Fabienne Wade, P.T., made these findings, which were in turn relied upon by Mr. Robert Zimmerman, who conducted the Labor Market Survey (LMS) in this case. Similarly, Claimant submitted the report of Dr. Alan Talens, which noted a reduction in movement. (C-2). Employer and Carrier submitted the report of Dr. Robert Smith, but he offered no opinion as to restrictions or ability. He merely stated that based upon Claimant’s job description, he could perform his supervisory duties. (E-9, p. 285). This does not contradict SOAR. Employer also submitted a videotape of Claimant at various activities from April of 1999. (T-76; E-11). I have viewed this film, and find that it in no way contradicts Claimant’s position. Mr. Madigan is shown walking around, carrying light objects such as a clipboard and papers in his left hand (below shoulder level), and working around his house. Never, in my viewing, did Claimant reach over his head or lift any heavy weight. He did at one time flip over a piece of wood or cardboard on sawhorses, but there was again no indication that this act involved reaching above shoulder height. I find, therefore, that Claimant is physically impaired.

Physical impairment, however, is not the same as “disability.” Disability is defined under

the Act in economic terms. A person is disabled if, due to injury, their wage earning capacity is in some way reduced. 33 U.S.C. § 902(10). When a claimant has a physical impairment from an injury but is performing his usual work, the employee's actual wages can fairly represent his wage-earning capacity, and he has suffered no loss and therefore is not disabled. 33 U.S.C. § 908(h); Del Vacchio v. Sun Shipbuilding & Dry Dock Co., 16 BRBS 190, 194 (1984). I find that in the case of Mr. Madigan, wage earning capacity is not reduced. Mr. Madigan was able, and continues to be able, to perform the job he held with Raytheon and, initially, PRC. The job description noted above is supervisory in nature. Mr. Madigan testified that his job was supervisory. (T-19-20, 84-85). That is not to say that Claimant did not perform some degree of “hands-on” work, such as climbing the antennae or physically inspecting overhead cables. In fact, I find that Claimant did do so. (T-84-85).

A technician at the GPS site is responsible for maintaining the antennae and other installations necessary to keep the site properly operating. This involved doing repairs on a variety of equipment, including transformers, cables and wiring, and the parabolic antennae. (T-32-33). Reaching overhead cables and climbing into the antennae were repeatedly cited by both sides as the major functions Mr. Madigan was unable to perform. It is obvious why overhead cables would cause a problem; Claimant’s motion above shoulder height is restricted due to pain. The maintenance of the antennae involved riding a hydraulic lift to a certain point on the structure, and then climbing a ladder to reach the equipment. (T-33). Mr. Madigan had difficulty climbing the ladder, as it required not only reaching, but also lifting his own body weight. (T-34). He does indicate that he managed it on occasion, but that it was not easy. (T-86).

That does not alter the fact, however, that it was not necessary for his job. That he chose to perform his job in a way Employer did not find necessary is irrelevant to the analysis of his ability to perform the actual job requirements. As Mr. Louis Stegman, Claimant’s supervisor at Raytheon, testified, the lead technician’s job was to delegate such jobs to the underlings, and to make sure that the other technicians were qualified and capable of adequately performing their duties. (T-118). If they were not, or, as Mr. Madigan testified, he did not trust their work (T-84), it was his responsibility to take some kind of employment action. “Initiates recommendations for changes in classification, promotion, demotion, transfer and termination” is how the responsibility was described. (E-6). The remainder of the job description, repeated above, is also supervisory in nature. Additionally, neither Claimant nor his supervisor could point to an incident where Claimant could not perform his job and had to ask for help. Mr. Madigan claims that people “were aware,” but this is supposition on his part. (T-36). The fact remains that, even though Claimant was officially on light duty with Raytheon, he continued to perform the same job without any accommodation for his injury. Most important, however, is the fact that not only did Claimant continue to work for Raytheon after his injury, he actually interviewed for and was hired for the same position at a new company. Clearly, PRC found no disability or inability to perform the job duties.

Even if Claimant has established a disability, it is at most permanent partial. As was mentioned above, the extent of the restrictions on Claimant are undisputed, and the video of Mr.

Madigan contained in the record supports the finding that he is generally capable of most activities. It truly is a relatively limited set of motions which he cannot perform, and Claimant admits that he is capable of doing some work. (T-77-78). Section 8(c)(21) provides that an award for unscheduled permanent partial disability is based on the difference between the claimant's pre-injury average weekly wage and his post-injury wage-earning capacity. The pre-injury average weekly wage has been stipulated to as \$722.33.³ The post injury average wage earning capacity is to be based on a number of variables, including but not limited to, Claimant's age, job skills, education, work history, and physical limitations. Employer, of course, bears the burden of demonstrating wage earning capacity. In this case, Employer has met its burden through several means.

First, Mr. Madigan was injured in May of 1995, but continued to work for Raytheon in the exact same position, doing the work as Raytheon expected him to do, until September of 1995. He then quit his job with Raytheon. (E-12, p. 362). His injury and any impairment he had did not impact upon his employment at all. Further, it did not impact upon his employability. Under the exact same physical restrictions, and while still officially on light duty, Mr. Madigan interviewed for and obtained a position with PRC. First, because Claimant continued to work for the Employer in a job that was not sheltered or mere beneficence, Employer has met its burden of proof to show suitable alternate employment. Spencer v. Baker Agricultural Co., 16 BRBS 205 (1984); Darden v. Newport News Shipbuilding & Dry Dock Co., 18 BRBS 224 (1986). Based merely upon that, Claimant is not entitled to any compensation because his old wage and the wage earning capacity demonstrated by the actual wages of his post-injury employment are equal. I find that because Claimant continued to perform his job according to the Employer's expectations, regardless of his own view of his duties, the actual wages are a fair and accurate reflection of his wage earning capacity, a finding required by law. Eagle Marine Services v. Director, OWCP, 115 F.3d 737, 739, 31 BRBS 49 (CRT)(9th Cir.1997). Additionally, Claimant obtained further employment in the same field, in the same capacity, following his injury. This is compelling proof that suitable alternate employment existed at the time of injury, and that it was available to Claimant and he was likely to obtain employment through diligent application.

Second, Employer has submitted a Labor Market Survey (LMS). (E-13). The LMS was objected to by Claimant on several grounds. Claimant objects that the LMS was provided only on the day of the hearing, which did not provide proper time for Claimant to respond to its allegations. I do not credit this argument. It is true that the LMS was not available until late in this proceeding, but the record was left open and the parties given time to submit post hearing briefs. Both sides to this controversy have done so. Claimant addressed the LMS with specificity, and I find that adequate opportunity to evaluate and respond to the LMS was available and utilized. I would note that the far-flung locales involved in these proceedings have presented difficulties for all parties.

³This corresponds to a yearly wage of \$37,561.16 (\$722.33 x 52 weeks), and an hourly wage of \$18.06 (\$722.33 / 40 hours). I provide these calculations in order to create a firmer basis of comparison for the LMS figures.

Claimant also contends that the LMS is based upon erroneous presumptions and must therefore be disregarded or at the very least discounted in arriving at a wage earning capacity. Specifically, Claimant argues that Mr. Zimmerman of Crawford and Company, the preparer of the survey, assumed that Claimant possessed a “BS degree in Electronic Engineering.” (E-13). Claimant testified at hearing, however, that his degree was obtained from adult education classes, and that he did not have a Bachelor of Science degree, and in fact has an unspecified degree in “electronics.” (T-110-113). Presumably, Claimant wishes to throw out all jobs located by Mr. Zimmerman, with the exception of the minimum wage positions he claims to be suited to. (T-77). However, the basis of Mr. Zimmerman’s assumption can be found in the résumé of Claimant. (E-13). Two versions of that document, one presented to Raytheon and the other to PRC by the Claimant, clearly state “Bachelor of Science, Electronics Engineering...Chapman University, Orange, California.” (E-10, p. 315; E-7, p. 200, 201). An employer is entitled to rely upon the accuracy of the assertions of an employee on a resume. To allow Claimant to misrepresent his qualifications to potential employers but not allow Employer to in good faith use those same representations is at odds with all notions of fairness. Further, there is no evidence in the record that Employer knew or had reason to know that the resume of Claimant was inaccurate, and as I noted above, the distances involved here have presented many difficulties in scheduling examinations and interviews. While I have found no authority directly on point, in Brooks v. Director, OWCP and Newport News Shipbuilding and Dry Dock Co., 2 F.3d 64, 27 B.R.B.S. 100 (CRT)(4th Cir. 1993), the Court of Appeals agreed with the Benefits Review Board’s conclusion that a claimant’s malfeasance, in that case falsifying company records by not revealing a prior injury, operated to prevent the claimant from performing the post injury job, and therefore his loss of wage earning capacity was due not to injury, but to his misconduct. The claimant in Brooks lost wages and could not replace them because he had lied to his employer, and in getting caught had made himself unemployable. The situation here is analogous. Mr. Madigan may be unemployable at the wage found by Employer and recited in the LMS, but that is because he “padded” his resume and submitted the same to Employer, who reasonably relied upon it.. Applying the rationale of Brooks, he may not now claim no suitable alternate employment based upon his own malfeasance. I therefore find that Claimant cannot now object to use of his own declarations as a basis of the LMS.

The LMS is based upon the availability of employment in the Guam labor market, a different locale than the situs of the injury. This is a proper market, as Claimant relocated there because his wife, an employee of the Bank of Guam, was re-assigned. (T-40 ,75). Relocation may be presumed proper. Wood v. U.S. Dept. of Labor, 112 F.3d 592, 31 BRBS 43 (CRT) (1st Cir. 1997). It is not necessary to go so far in this case, however, and I instead rely upon See v. Washington Metropolitan Area Transit Auth., 36 F.3d 375 (4th Cir. 1994), which requires a consideration of the reasons for the move and any prejudice to the employer, and find the relocation reasonable. Obviously Employer agreed, as it conducted its survey in Guam. An employer must demonstrate that suitable alternate employment exists in the applicable labor market. Bumble Bee Seafoods v. Director, OWCP, 629 F.2d 1327, 12 BRBS 660 (9th Cir. 1980), *aff’g* Hansen v. Bumble Bee Seafoods, 7 BRBS 680 (1978) Further, in the Ninth Circuit, an Employer must show that the Claimant “would be hired if he diligently sought the job.”

Hairston v. Todd Pacific Shipyards Corp., 849 F.2d 1194, 1196 (9th Cir. 1988); Fox v. Wesr State Inc., 31 BRBS 118 (1997). Once such a showing has been made, the Claimant may rebut by showing a diligent search and a willingness to work, which are nonetheless fruitless Hairston, supra; Williams v. Halter Marine Serv., 19 BRBS 248 (1987). In this case, the LMS identified 6 potential jobs. As both the LMS and Claimant's brief noted, the physical requirements for "Electronics Worker" and "Electronics Technician" may exceed the restrictions both sides have agreed apply to Mr. Madigan, and I therefore find those positions do not establish suitable alternate employment. As to the remaining four jobs, Claimant makes the objection that the job qualification of a Bachelor's degree in engineering excludes Mr. Madigan. As I stated above, this objection carries no weight, as it is based upon Claimant's own misrepresentation.⁴ Claimant also raises the concern that availability has not been demonstrated. However, Employer need not show the availability of a specific job, merely the availability of jobs in the applicable labor market. I find that Employer has done so here. I base this upon the two regular, full-time jobs listed ("Test Engineer" and "Electrical Engineer"), rather than the two temporary positions as technicians. A job must be shown to be regularly available under Edwards v. Director, OWCP, 99 F.2d 1374 (9th Cir. 1993); cert. denied, 114 S. Ct. 1539 (1994), and I find that the "temporary" designation of these jobs does not qualify. Further, I find that the evidence supports a finding that the jobs found could be had by the Claimant if diligently applied for. Claimant has shown his ability to obtain employment after this injury by switching from Raytheon to PRC. Also, Mr. Madigan indicated that his major problem in searching for employment was his involvement in a worker's compensation proceeding. (T-109). Once that obstacle is removed by the conclusion of these proceedings, when combined with my finding that the partial disability here is not limiting in a supervisory position, Mr. Madigan is eminently employable.

The wage for the two permanent positions are \$40,000 per year, or \$18.15 per hour, both of which exceed the average weekly wage of Claimant before injury. (See Fn. 3). Therefore, because I find that Employer has shown suitable alternate employment and the earning capacity demonstrated by the market wage exceeds the average weekly wage, I find that even if Claimant is partially disabled under the Act, which he is not, he is not entitled to any compensation. Additionally, Employer has submitted with the labor market study the opinions of various employers as to the potential earning capacity for an individual with Mr. Madigan's stated qualifications. While none of these employers is noted to be an expert on wages, all 5 persons who did name figures estimated that Claimant could earn in excess of \$45,000.00 per year, although the location of employment was not mentioned. (E-13).

Based on the foregoing, I find that Mr. Madigan was injured on May 30, 1995, and that he became temporarily totally disabled on July 15, 1996, the date of the first operation on his left shoulder. Recovery from this procedure was marred by complications. He remained temporarily totally disabled until October 27, 1998, the date of Maximum Medical Improvement (MMI). Mr.

⁴It is not my intention to imply Claimant has in bad faith misled Employer as to his qualifications. It may be a common practice to "pad" résumés, but the fact remains that Claimant cannot complain if Employer presents him the same way he presented himself.

Madigan was not disabled at all from May 30, 1995 until the date of his first operation because he continued working at his pre-injury employment throughout that period. Similarly, he was not disabled after the MMI because the record shows he was capable of returning to his supervisory position.

Impact of Demotion and RIF

Because I have found that 1) Mr. Madigan is not disabled under the Act, and 2) Raytheon has proven suitable alternate employment in two labor markets, it is not strictly necessary to discuss the impact of Mr. Madigan's demotion and laying off. However, the rather complex and unusual time line of the case invites some explanation. Mr. Madigan worked for Dyncorp, and then Raytheon. He was hurt while working for Raytheon. He then quit Raytheon and went to work for PRC. PRC demoted and then RIF'd Mr. Madigan. After the RIF, Mr. Madigan had both his operations and filed this claim.

Mr. Madigan represented that he has not made a claim of discrimination based firing for a physical impairment. He has, however, presented evidence regarding his demotion and RIF. He alleges that he was unable to do his new job (as a regular technician) because of his injury, which may have been the basis for the RIF. He should therefore be considered disabled.

However, the argument fails on two grounds. First, even if I do accept the demotion and firing as proof of disability, such disability is only partial, and I have already found that Employer has shown suitable alternate employment. In light of the alternate employment shown, I have found that Claimant's wage earning capacity is not reduced, and therefore no compensation is owed.

Second, I find that Mr. Madigan had failed to prove that his demotion and RIF were due to his injury and not some unrelated cause. I will address the demotion first. Mr. Madigan went to work for PRC in September of 1995, when that company was granted the subcontract for maintenance of the GPS facilities on Kwajalein. He was a Site Manager, or lead technician, and in that capacity had the same responsibilities and duties as he had with Raytheon, as noted above. (T-32). Six months later, Claimant was notified that he was being demoted from that supervisory position to technician for "lack of performance and consumption of alcohol during normal duty hours." (E-10, p. 321). Mr. Madigan testified that he did not object to the demotion at the time, although he did object to the new pay rate. (T-103). At the time of hearing, he maintained that the allegations were false and pretextual, and that the "lack of performance" notation referred to his physical restrictions. (T-101). He also explained that the allegation of drinking arose from having beer in his truck when called to an emergency repair; he and his off-duty crew were having drinks on the beach when the call came. (T-138). There are contained in the record no documents or reports to back up the allegations made by PRC, but neither does Mr. Madigan produce any substantial evidence to support his counter allegations. There is in the record a performance evaluation from PRC which is generally positive, although it does note some problems dealing with customers and "team building." (E-10, p. 343-356). In view of the testimony of Mr. Madigan and Mr. Stegman, as well as the documents in the record, I find that Claimant has not

proven that the demotion was due to injury. I do not make a finding as to the actual reasons for the employment action; I merely find that Claimant has not met his burden of rebutting Employer's stated reasons, and therefore accept Employer's rationale. I do find, however, that Claimant seeks to prove disability through a demotion he received for reasons unrelated to his impairment.

Similarly, Claimant argues that the RIF which followed in June of 1996 was a result of him not being able to perform the functions of a regular technician. That he could not perform the functions is not contested. Claimant's physical impairment does indeed prevent him from doing many of the tasks necessary for a technician, such as reaching overhead cable boxes or climbing the ladder into an antennae. Claimant, if his regular employment was as a technician, was disabled. However, the reason Claimant was a technician was, as is noted above, his own misconduct. That allegation was not rebutted by the Claimant, and Employer has presented enough evidence to make it's position realistic, if not proven to a legal standard.⁵ Because the demotion was due to the misconduct of the Claimant, I may consider the wage paid to a Unit Leader for PRC. "[T]he actual earnings in a suitable job lost by claimant's misconduct, like any other suitable job claimant holds post injury, should be considered by the administrative law judge in determining claimant's wage earning capacity." Mangaliman v. Lockheed Shipbuilding Co., 30 BRBS 39 (1996). I therefore find that, because the supervisory position of lead technician was a suitable job for Claimant following his injury (and indeed remained so even after the two surgeries and the attendant complications), and was lost due to the misconduct of the Claimant, it is to be heavily weighed in determining the wage earning capacity of Mr. Madigan. I also consider such factors as age, education, experience, physical condition, availability of employment as shown in the LMS, and the estimates of Claimant's value in the job market as presented in the LMS.⁶ Claimant's demotion and eventual RIF, then, have no impact upon the result reached here.

De Minimis Award

The Supreme Court has held that a *de minimis* award is permissible, but that it is within the discretion of the administrative law judge. Metropolitan Stevedore Co. v. Rambo [Rambo II],

⁵I would note that Claimant was asked if he had considered a case under the Americans with Disabilities Act (ADA), but he indicated that he had let too much time pass. As I said above, I do not find that Employer, based on the evidence before me, would have been able to rebut Claimant's *prima facie* case in such a suit, but in this case under the LHWCA, the burdens are reversed. Claimant must rebut, and has not done so sufficiently.

⁶The salary estimates range from \$45,000.00 to \$60,000.00. I find that these estimates are a bit high, and believe that approximately \$40,000.00 per year would be more reasonable, given the average weekly wage found herein, and the fact that all the estimates were based upon Mr. Madigan having an electronics engineering degree. Further, Employer has merely stated the position of each of the consulted persons, and has not sufficiently established their qualifications to offer an opinion.

521 U.S. 121, 117 S. Ct. 1953. I decline to grant such an award in this case. No evidence has been presented to indicate that his earning capacity in the future will be impacted by the injury, as Rambo II, *supra*, requires. Mr. Madigan's career had shown an expected progression, moving upward from labor to supervisory positions. He had, in fact, reached the point in his career where physical labor was no longer routinely expected of him. Further, even if I were to assume that in the future his demotion and RIF by PRC would affect his ability to obtain a supervisory position, that obstacle has not been proven to result from the injury. Instead, because of the lack of adequate rebuttal by Claimant, I accept Employer's contention that the employment actions were due to Claimant's misconduct. Again, it is not the injury which has caused the lack of wage earning capacity.

Medical Benefits

Claimant stated in his pre-hearing statement, and again at hearing, that he had no outstanding medical bills. (T-59). He did, however, ask for payment of *per diem* and hotel fees related to his rehabilitation in the Philippines and in Kuauai following the second operation, as well as transportation costs from island to island.⁷ (T-59-65). Costs incurred for transportation for medical purposes are recoverable under Section 7(a) of the LHWCA. *Day v. Ship Shape Maintenance Co.*, 16 BRBS 38 (1983). The DBA, of course, incorporates the § 7 language of the LHWCA. Parking fees and tolls incurred while traveling to or attending medical appointments may also be reimbursed. *Castagna v. Sears, Roebuck & Co.*, 4 BRBS 559 (1976), *aff'd mem.*, 589 F.2d 1115 (D.C. Cir. 1978). The payments sought by Claimant for hotels and *per diems*, because of the distances involved and the difficulty of moving from island to island for appointments and such, fall under the general umbrella of "travel expenses." Travel expenses incurred in traveling between islands (Ebeye, Guam, the Philippines, Kuauai, etc.) would be considered a medical expense if they occurred while traveling to medically necessary appointments.

I note that Claimant's wife's insurance covered the cost of the therapy in the Philippines. (T-54). It is unclear whether they also paid for travel, although Claimant clearly testified that he paid his housing costs for the approximately 2 months he was there. (T-56). He lived with his in-laws during that time. Additionally, Dr. Marumoto made clear in his deposition that he had not prescribed this additional physical therapy, after discussion with Mr. Madigan regarding his options. (C-9, pp. 22-24). The doctor prescribed two weeks of therapy in Honolulu, which Carrier apparently paid all expenses of. Claimant told the doctor that after all the difficulty he had obtaining quality therapy on Kwajalein after the first operation, he would rather just do his own home regimen, which Dr. Marumoto released him to. (C-9, p 24). The therapy in the Philippines, then, was not prescribed by a doctor, but was instead Claimant's own choice. There is no clear indication in the record that Claimant requested Carrier to pay for the therapy. He does state that

⁷It is important to distinguish between the *per diem*, which was a pre-determined amount that covered meals and local transportation, and the hotel fee, which was a separate allotment based entirely upon what accommodations you stayed in.

he desired to have more therapy, and “they didn’t want to do it, so I went and got some of my own.” (T-54). Because Dr. Marumoto had released Claimant from further prescribed therapy, with the exception of the home exercises, I find that the therapy obtained in the Philippines was not medically necessary at that time, and therefore Employer is not required to pay for it. Likewise, Employer is not liable for Claimant’s living expenses while he sought this treatment.

However, as to the physical therapy in Kuaui following the second operation, there is no question that it was, if not prescribed, at least consented to as necessary by Employer and Carrier. Mr. Madigan so testified. “They would pay for the physical therapy. In other words, its available over there if I wanted it, but I’d have to take care of myself.” (T-57). This referred to the need of Claimant to go to Kuaui instead of receiving treatment in Honolulu for the treatment Dr. Marumoto had ordered. (C-9, p. 29-30). Further, because Dr. Marumoto ordered the therapy, I find it was medically necessary, and Employer would therefore be liable. Also, Carrier evidently did pay for the physical therapy, as no bill is outstanding and Claimant has not sought reimbursement. Mr. Madigan, while on Kuaui, lived with his adult daughter and her family. At some point during his stay, Claimant told his daughter that he would pay her for the trouble she had gone to in having him there. (T-58). This money was the *per diem* he anticipated receiving and now seeks. Claimant also seeks travel expenses in the amount of \$110.00 per round trip between islands. (T-64). Claimant maintains that the expenses were promised him, at least in connection with his Honolulu expenditures, but that his expense report was rejected by the same woman who had authorized or requested it in the first place, Ms. Cindy Main. (T-65).

I find that Mr. Madigan is entitled to the travel expenses incurred in connection with his physical therapy and doctor visits from on or about April 16, 1997 to May 9, 1997. These are the dates reflected in Dr. Marumoto’s notes and reports. He is also entitled to the *per diem* for this period.⁸ What is less clear is Claimant’s entitlement to a housing allowance for this period. Certainly any hotel charges in Honolulu should be paid by Carrier and Employer as a part of the travel expenses. If Mr. Madigan had stayed at a hotel, Employer would have paid that specific rate, as Claimant illustrated during his testimony by recounting the cost of the various hotels he had stayed at during his treatment. Mr. Madigan, however, incurred no expense for a hotel; he stayed with family. Certainly it was an inconvenience to Mr. Madigan’s daughter and her family, but Mr. Madigan incurred no actual cost for the stay. Absent unusual circumstances, I decline to award any hotel fees as a part of *per diem* expenses.

Order

1) Mr. Madigan’s claim for permanent total and permanent partial disability compensation under the Act is therefore **DENIED**.

⁸The record as it appears before me is not clear as to exact travel dates and expenses, and I therefore use these dates as reference points, and expect that the District Director will make more specific findings regarding my “in connection with” language.

2) Mr. Madigan was temporarily totally disabled from July 15, 1996, the date of his first operation, until October 27, 1997, the date of MMI. Compensation benefits are **GRANTED** for that period, based upon the stipulated average weekly wage of \$722.33.

3) Mr. Madigan is entitled to payment for medical expenses including travel expenses (plane fare) and a meal *per diem* relating to his treatment in Honolulu and Kuauai following his second operation on the left shoulder. These medical expense related items are **GRANTED**.

4) The District Director will make or verify all calculations to implement the above, including interest, if any, and set-offs for amounts already paid.

John C. Holmes
Administrative Law Judge